

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NICK LYNN ENGLISH,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 3:16-cv-05010-RSL-KLS

REPORT AND RECOMMENDATION
REGARDING PLAINTIFF'S MOTION
FOR ATTORNEY FEES UNDER 28
U.S.C. § 2412(d)

Noted for December 23, 2016

This matter is before the Court on plaintiff's motion for attorney fees pursuant to the Equal Access to Justice Act (EAJA). Dkt. 21; 28 U.S.C. § 2412. This matter has been referred to the undersigned Magistrate Judge. *Mathews, Sec'y of H.E.W. v. Weber*, 423 U.S. 261 (1976); 28 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4). For the reasons set forth below, the undersigned recommends plaintiff's motion be granted, subject to calculation of the total amount of attorney fees discussed herein.

DISCUSSION

Plaintiff sought judicial review of the denial of his applications for disability insurance and supplemental security income benefits, requesting that the ALJ's decision that she was not disabled be reversed and remanded. The Court agreed that the matter should be reversed and remanded, finding the ALJ had failed to resolve an apparent conflict between the vocational expert's testimony and the Dictionary of Occupational Titles (DOT), concerning the handling

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1 and fingering requirements of the two jobs the vocational expert at the hearing identified as jobs
 2 that plaintiff could do. Dkt. 18.

3 The EAJA provides:

4 Except as otherwise specifically provided by statute, a court shall award to a
 5 prevailing party other than the United States fees and other expenses, in
 6 addition to any costs awarded pursuant to subsection (a), incurred by that
 7 party in any civil action (other than cases sounding in tort), including
 8 proceedings for judicial review of agency action, brought by or against the
 9 United States in any court having jurisdiction of that action, unless the court
 10 finds that the position of the United States was substantially justified or that
 11 special circumstances make an award unjust.

12 28 U.S.C. § 2412(d)(1)(A). Thus, to be eligible for attorney fees under the EAJA: (1) the
 13 claimant must be a “prevailing party”; (2) the government’s position must not have been
 14 “substantially justified”; and (3) no “special circumstances” exist that make an award of attorney
 15 fees unjust. *Comm’r, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 158 (1990).

16 In Social Security disability cases, “[a] plaintiff who obtains a sentence four remand is
 17 considered a prevailing party for purposes of attorneys’ fees.” *Akopyan v. Barnhart*, 296 F.3d
 18 852, 854 (9th Cir. 2002) (citing *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993).¹ Such a
 19 plaintiff is considered a prevailing party even when the case is remanded for further
 20 administrative proceedings. *Id.* There is no issue as to whether plaintiff is a prevailing party
 21 given that as discussed above, this case was remanded for further administrative proceedings. In
 22 addition, defendant does not argue there are any special circumstances making an award of
 23 attorney’s fees unjust.

24 ¹ Section 405(g) of Title 42 of the United States Code “authorizes district courts to review administrative decisions
 25 in Social Security benefit cases.” *Id.*, 296 F.3d at 854. Sentence four and sentence six of Section 405(g) “set forth
 26 the exclusive methods by which district courts may remand [a case] to the Commissioner.” *Id.* “The fourth sentence
 of § 405(g) authorizes a court to enter ‘a judgment affirming, modifying, or reversing the decision of the
 [Commissioner], with or without remanding the cause for a rehearing.’ *Melkonyan v. Sullivan*, 501 U.S. 89, 98
 (1991); *see also Akopyan*, 296 F.3d at 854 (sentence four remand is “essentially a determination that the agency
 erred in some respect in reaching a decision to deny benefits.”).

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1 I. The Government's Position Was Not Substantially Justified

2 As noted above, to be entitled to attorney fees, the government's position must not be
 3 "substantially justified." *Jean*, 496 U.S. at 158. Normally, for the government's position to be
 4 "substantially justified," this requires an inquiry into whether the government's conduct was
 5 "justified in substance or in the main" – that is, justified to a degree that could satisfy a
 6 "reasonable person" – and "had a 'reasonable basis both in law and fact.'" *Gutierrez v. Barnhart*,
 7 274 F.3d 1255, 1258 (9th Cir. 2001) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988));
 8 *Penrod v. Apfel*, 54 F.Supp.2d 961, 964 (D. Ariz. 1999) (citing *Pierce*, 487 U.S. at 565); *see also*
 9 *Jean*, 496 U.S. at 158 n.6; *Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995). This "does not
 10 mean 'justified to a high degree.'" *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998) (quoting
 11 *Pierce*, 487 U.S. at 565). On the other hand, "the test" for substantial justification "must be more
 12 than mere reasonableness." *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988).

14 The government has the burden of establishing substantial justification. *Gutierrez*, 274
 15 F.3d at 1258. Its position must be "as a whole, substantially justified." *Id.* at 1258-59 (emphasis
 16 in original). It also "must be 'substantially justified' at 'each stage of the proceedings.'" *Corbin*,
 17 149 F.3d at 1052. "[D]istrict courts should focus on whether the government's position on the
 18 particular issue on which the claimant earned remand was substantially justified, not on whether
 19 the government's ultimate disability determination was substantially justified." *Hardisty v.*
 20 *Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010). Accordingly, the government must establish that it
 21 was substantially justified both in terms of "the underlying conduct of the ALJ" and "its
 22 litigation position defending the ALJ's error." *Gutierrez*, 274 F.3d at 1259. As the Ninth Circuit
 23 has explained:

26 The plain language of the EAJA states that the "position of the United States" means, in addition to the position taken by the United States in the civil

1 action, the action or failure to act by the agency upon which the civil action is
 2 based.” 28 U.S.C. § 2412(d)(2)(D); *Jean*, 496 U.S. at 159, 110 S.Ct. 2316
 3 (explaining that the “position” relevant to the inquiry “may encompass both
 4 the agency’s prelitigation conduct and the [agency’s] subsequent litigation
 5 positions”). Thus we “must focus on two questions: first, whether the
 6 government was substantially justified in taking its original action; and,
 7 second, whether the government was substantially justified in defending the
 8 validity of the action in court.” *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir.
 9 1988).

10 *Id.*

11 “In evaluating the government’s position to determine whether it [i]s substantially
 12 justified,” therefore, the Court “look[s] to the record of both the underlying government conduct
 13 at issue and the totality of circumstances present before and during litigation.” *Sampson v.*
 14 *Chater*, 103 F.3d 918, 921 (9th Cir. 1996); *see also Kali*, 854 F.2d at 332; *Thomas v. Peterson*,
 15 841 F.2d 332, 334-35 (9th Cir. 1988). Indeed, the Ninth Circuit has explicitly stated that “[i]t is
 16 difficult to imagine any circumstance in which the government’s decision to defend its actions in
 17 court would be substantially justified, but the underlying decision would not.” *Sampson*, 103
 18 F.3d at 922 (quoting *Flores*, 49 F.3d at 570 n.11). While the EAJA creates “a presumption that
 19 fees will be awarded unless the government’s position was substantially justified,” the
 20 government’s “failure to prevail does not raise a presumption that its position was not
 21 substantially justified.” *Kali*, 854 F.2d at 332, 334; *Thomas*, 841 F.2d at 335; *see also Flores*, 49
 22 F.3d at 569.

23 Substantial justification will not be found where the government defends “on appeal . . .
 24 ‘basic and fundamental’ procedural mistakes made by the ALJ.” *Lewis v. Barnhart*, 281 F.3d
 25 1081, 1085 (9th Cir. 2002) (quoting *Corbin*, 149 F.3d at 1053). In *Corbin*, the Ninth Circuit
 26 found “the failure to make [specific] findings” and “weigh evidence” to be “serious” procedural
 errors, making it “difficult to justify” the government’s position on appeal in that case. 149 F.3d

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1 at 1053. In *Shafer v. Astrue*, the Ninth Circuit found the ALJ “committed the same fundamental
 2 procedural errors” noted in *Corbin* in failing “to provide clear and convincing reasons for
 3 discrediting [the claimant’s] subjective complaints,” and “to make any findings regarding” the
 4 diagnosis of a non-examining medical expert. 518 F.3d 1067, 1072 (9th Cir. 2008). It went on to
 5 find that the ALJ had committed additional procedural errors not present in *Corbin*, including
 6 rejecting “a treating physician’s opinion in favor of a non-treating physician’s opinion without
 7 providing clear and convincing reasons.” *Id.*

9 Defendant argues the government’s position was substantially justified, because the
 10 conflict between the vocational expert’s testimony and the DOT was only potential and not
 11 apparent. *See Johnson v. Astrue*, 2009 WL 801238, at *4 (N.D. Cal. March 25, 2009) (“The ALJ
 12 must clarify the discrepancy in the opinion *only where there is an apparent unresolved conflict*
 13 that arises between the vocational expert’s testimony and the DOT.”) (quoting *Mickelson-Wurm*
 14 *v. Comm’r Social Sec. Admin.*, 285 Fed. Appx. 482, 486 (9th Cir. 2008) (citing *Johnson v.*
 15 *Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995)) (emphasis in the original). The undersigned,
 16 however, disagrees that the conflict was not apparent.

18 It is true that “not all potential conflicts between [a vocational] expert’s job suitability
 19 recommendation and the” DOT’s description of a job “will be apparent or obvious,” and that “an
 20 ALJ need only follow up on those that are.” *Gutierrez v. Colvin*, --- F.3 ---, 2016 WL 6958946,
 21 at *2 (9th Cir. 2016). Accordingly, “[f]or a difference between an expert’s testimony and the
 22 [DOT] to be fairly characterized as a conflict, it must be obvious and apparent.” *Id.* “This means
 23 that the testimony must be at odds with the [DOT’s description] of job requirements that are
 24 essential, integral, or expected.” *Id.* “[T]asks that aren’t essential, integral, or expected parts of a
 25 job are less likely to qualify as apparent conflicts that the ALJ must ask about.” *Id.* “Likewise,

1 where the job itself is a familiar one – like cashiering – less scrutiny by the ALJ is required.” *Id.*

2 The ALJ, accordingly, “must ask follow up questions of a vocational expert when the
 3 expert’s testimony is either obviously or apparently contrary to the [DOT], but the obligation
 4 doesn’t extend to unlikely situations or circumstances.” *Id.* at *3. Thus, “where the frequency or
 5 necessity of a [job’s] task is unlikely and unforeseeable – as it is with cashiers having to reach
 6 overhead – there’s no [such] obligation.” *Id.* (observing that while “‘frequent reaching’ is
 7 required of both cashiers and stock clerks” in the DOT, “anyone who’s made a trip to the corner
 8 grocery store knows that while a clerk stocking shelves has to reach overhead frequently, the
 9 typical cashier never has to.”).

10 Here, the vocational expert testified that an individual with the same residual functional
 11 capacity as plaintiff, including the limitation to only occasional handling and fingering with the
 12 dominant right hand, could perform the jobs of food assembler and price marker. AR 81. Unlike
 13 the job of cashier, the jobs of food assembler and price marker largely involve tasks that require
 14 handling and fingering. For example, the job of food assembler requires:

- 15 • prepares meal trays;
- 16 • fills individual serving cartons with portions of various foods and
 17 condiments by hand or automatic filling machine;
- 18 • portions and garnishes cooked foods into individual serving dishes;
- 19 • stores dishes of hot food on portable electric warming cabinet or food
 20 cart;
- 21 • removes pans of portioned cold food items from refrigerator or
 22 cafeteria dining unit and places them at stations of tray assembly
 23 counter;
- 24 • places food, silverware, and dishes in compartmented food tray
 25 passing over conveyor belt;
- 26 • Stores completed trays in refrigerated storage cabinets.

27 DOT 319.484-010, 1991 WL 672769. The job of price marker in turn requires:

- 28 • marks and attaches price tickets to articles of merchandise;
- 29 • marks selling price by hand on boxes or price tickets;
- 30 • ties, glues, sews, or staples price ticket to article;

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1 • presses lever or plunger of mechanism that pins, pastes, ties, or staples
 2 ticket to article;
 3 • may record number and types of articles and pack them in boxes;
 4 • may print information on tickets, using ticket-printing machine.

5 DOT 209.587-034, 1991 WL 671802.

6 While it may be that the DOT “refers to ‘occupations,’ not to specific jobs,” and that
 7 “[o]ccupation” is a broad term that includes ‘the collective description’ of ‘numerous jobs’ and
 8 lists ‘maximum requirements’ of the jobs as ‘generally performed’” – and therefore that “not all
 9 potential conflicts between [a vocational] expert’s job suitability recommendation and the” DOT
 10 “will be apparent or obvious” – handling and fingering appear to be at the heart of both the food
 11 assembler and price marker jobs. *Gutierrez*, 2016 WL 6958646, at *2. Thus, it should have been
 12 fairly apparent, if not obvious, to the ALJ that any significant limitation in the ability to perform
 13 those tasks, such as from the frequent to the merely occasional, would create a conflict requiring
 14 further questioning.

15 Defendant also argues the DOT “does not indicate that either job . . . requires frequent
 16 handling or fingering *with both hands.*” Dkt. 24, p. 3 (emphasis added). It is true that there may
 17 be some instances where the ability to use both upper extremities is not necessary to perform a
 18 job. For example, in *Gutierrez* the Ninth Circuit commented that even in the “atypical example”
 19 where “a store sells restricted merchandise, such as cigarettes, which are kept overhead,” and
 20 therefore could require overhead reaching, the plaintiff’s restriction “would not have prevented
 21 her from reaching overhead with her *left arm.*” 2016 WL 6958646, at *3, n. 2 (emphasis in the
 22 original). It is not clear in that case, however, which arm was the plaintiff’s dominant arm. In any
 23 event, unlike here where handling and fingering are the primary tasks, overhead reaching still
 24 would not have been an essential or integral part of the job. As such, the government’s position
 25 on this issue did not have a reasonable basis in either law or fact.

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1 II. The Reasonableness of Plaintiff's Attorney Fees Request

2 Before granting attorney fees under the EAJA, the Court must determine whether those
 3 fees are “reasonable.” *Jean*, 496 U.S. at 161; 28 U.S.C. § 2412(d)(1)(A). The test used to
 4 determine what fees are reasonable was set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983),
 5 which dealt with recovery of attorney fees under 42 U.S.C. § 1988. That test “also is applicable
 6 to awards of fees under the EAJA.” *Sorenson v. Mink*, 239 F.3d 1140, 1145 n.2 (9th Cir. 2001)
 7 (citing *Jean*, 496 U.S. at 161 (once private litigant has met eligibility requirements for EAJA
 8 fees, court’s task of determining what fee is reasonable is essentially same as that described in
 9 *Hensley*)); *see also Haworth v. State of Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995) (case law
 10 construing what is “reasonable” fee applies uniformly to all federal fee-shifting statutes) (quoting
 11 *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 2641 (1992)).

13 In determining “the amount of a reasonable fee,” the “most useful starting point” for the
 14 Court “is the number of hours reasonably expended on the litigation multiplied by a reasonable
 15 hourly rate.” *Hensley*, 461 U.S. at 433. To that end, “[t]he party seeking an award of fees should
 16 submit evidence supporting the hours worked and rates claimed.” *Id.* “Where the documentation
 17 of hours is inadequate,” the Court “may reduce the award accordingly.” *Id.* Further, the Court
 18 “should exclude from this initial fee calculation hours that were not ‘reasonably expended,’” and
 19 “[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request
 20 hours that are excessive, redundant, or otherwise unnecessary.” *Id.* at 434.

23 Defendant argues plaintiff’s fee request is unreasonable, because plaintiff’s counsel billed
 24 7.70 hours for preparing the reply brief, which was identical to the opening brief and appeared to
 25 simply be a re-filing of the latter. Dkt. 24 (citing Dkt. 13, 17, 21). In response, plaintiff’s counsel
 26 states he was not aware of this error until now, and agrees the hours spent drafting that reply did

1 not have an impact on the litigation and thus those hours should be removed from the fee request.
2 Dkt. 25, p. 1. Accordingly, the undersigned finds plaintiff's fee request should be reduced from
3 \$2,797.40 (Dkt. 21, 21-1) by \$1,476.09 (7.7 hours x \$191.70²) to \$1,436.33.³

4 CONCLUSION

5 Based on the foregoing discussion, the undersigned recommends that the Court find the
6 government's position was not substantially justified and that plaintiff is entitled to the amount
7 of attorney fees noted above.

8 The parties have **fourteen (14) days** from service of this Report and Recommendation to
9 file written objections thereto. 28 U.S.C. § 636(b)(1); Federal Rule of Civil Procedure (FRCP)
10 72(b); *see also* FRC P 6. Failure to file objections will result in a waiver of those objections for
11 purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the above time limit,
12 the Clerk shall set this matter for consideration on **December 23, 2016**, as noted in the caption.

13
14 DATED this 6th day of December, 2016.

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18 
19 Karen L. Strombom
20 United States Magistrate Judge

21
22 ² Plaintiff's counsel appears to have calculated the amount that should be reduced based on 7.60 hours spent on the
23 reply brief, rather than the 7.7 hours his itemized timesheet indicates, which includes 0.10 hours for docketing that
24 brief. Dkt. 21-1.

25 ³ This includes an additional 0.6 hours spent by plaintiff's counsel addressing defendant's arguments regarding the
26 issue of whether the government's position was substantially justified, for a further \$115.02 in attorney fees. Dkt.
25, 25-1; *Jean*, 496 U.S. at 161-62 (stating that "absent unreasonably dilatory conduct by the prevailing party in
any portion' of the litigation, which would justify denying fees for that portion, a fee award presumptively
encompasses all aspects of the civil action," and that "the EAJA – like other fee-shifting statutes – favors treating a
case as an inclusive whole") (citing *Sullivan v. Hudson*, 490 U.S. 877, 888 (1989) (stating where administrative
proceedings are "necessary to the attainment of the results Congress sought to promote by providing for fees, they
should be considered part and parcel of the action for which fees may be awarded").

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